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7 Attorney for plaintiffs and putative class

8 UNITED STATES DISTRICT COURT  
9  
10 NORTHERN DISTRICT OF CALIFORNIA

11 LUNELL GAMBLE, and SHEILA  
12 KENNEDY, on behalf of themselves as  
13 well as a class of similarly situated  
14 individuals,

15 Plaintiff

16 vs.

17 KAISER FOUNDATION HEALTH  
18 PLAN, INC; KAISER FOUNDATION  
19 HOSPITALS, INC.; and THE  
20 PERMANENTE MEDICAL GROUP;  
21 all doing business as KAISER  
22 PERMANENTE MEDICAL CARE  
23 PROGRAM

24 Defendants

Case No. 4:17-cv-06621-YGR

**DECLARATION OF COUNSEL IN  
SUPPORT OF PLAINTIFFS' RULE  
16 MOTION FOR AN ORDER  
ADDRESSING SETTLEMENT  
POSTURE AND POTENTIAL  
CONFLICT OF INTERESTS**

(Per ECF 103, parties to be notified if a  
hearing will be required.)

Hon. Yvonne Gonzalez Rogers

1       Jeremy L. Friedman declares and states:

2       1. I am attorney of record for named plaintiffs and the putative class in this case. I  
3 make this declaration in support of plaintiffs' Rule 16 motion concerning the parties'  
4 settlement posture and potential conflicts of interest. It is based upon my own personal  
5 knowledge. If called as a witness, I would and could testify competently to the following  
6 matters.

7       2. Employment discrimination litigation has been one of the three principal focuses of  
8 my 30 years of practice. Since I began my legal career, I have had at least one employment  
9 discrimination action pending on my docket of cases at any one time. My specialty in this  
10 arena is the ability to take an employment case from intake, through trial and appeal, on my  
11 own or with select association of counsel. As a sole practitioner, I cannot assume more than  
12 one or two such cases at a time, and so must plan carefully around which I take, how long  
13 they develop and whether association is required. Several of my most significant  
14 employment discrimination actions were against Kaiser, including race and disability  
15 discrimination actions on behalf of African-American women. Litigating these cases  
16 against Kaiser over the past two decades has taught me an enormous amount about Kaiser's  
17 structure, employment practices and legal defenses, and settlement tactics.

18       3. I was one of the attorneys representing plaintiffs and the putative class in Hill v.  
19 Kaiser Foundation Health Plan, Inc., Case No. 3:10-cv-02833-LB (initially assigned to  
20 Judge Seeborg). The dispute over Kaiser's settlement tactics in that case resulted in  
21 substantial post-settlement proceedings over waiver of attorneys' fees. As a result of that  
22 effort, I have modified the approach to settlement and fees in this case, including additional  
23 language in client retainer agreements, and the decision to bring this Rule 16 motion.

24       4. As is typical in discrimination actions, plaintiffs Gamble and Kennedy required  
25 legal representation by experienced counsel such as myself, but they were unable to pay my  
26 high hourly rate on a non-contingent basis. It was therefore necessary for them to find an  
27 attorney willing to take their cases on a contingent basis. Moreover, legal fees in their cases  
28 against Kaiser were expected to quickly outpace plaintiffs' damages. In my experience,

1 there are no limits on the amount of legal resources Kaiser might require of my in my  
2 litigations against it. Plaintiffs could not have secured my representation on a pure-  
3 contingency fee basis, tied to a percentage of their recovery.

4 5. As expressly discussed and agreed upon orally, and as written into the retainer  
5 agreements, I agreed to represent plaintiffs as clients, conditioned on their assignment of  
6 rights to recover any and all statutory fees which may be awarded by judgment or settlement  
7 in the action. In the written agreement, plaintiffs agreed:

8 All attorneys' fees recovered pursuant to any statutory or common law fee-shifting  
9 provisions, Federal and California, for work done in connection with this litigation  
10 are property of the attorneys, as provided by California law (*Flannery v Prentice*)  
and shall not be regarded as property of the client.

11 6. Each agreement contained the following clause concerning assignment and the  
12 potential conflict of interest that might arise during settlement discussions:

13 The Court may order, or the parties to the litigation may agree, that the defendants  
14 will pay some or all of attorneys' fees, costs, or both. Any such order or agreement  
15 will not affect Client's obligations under this agreement except as stated in this  
16 Section regarding calculation of the amount of attorneys' fees owed under this  
17 agreement and as stated in Section 6. Client agrees that any attorneys' fees that may  
18 be recovered from defendants in this case shall belong to Attorneys, to whom Client  
19 assigns her rights. Client understands that, under California law, the assignment of  
20 these rights may raise a potential conflict of interest between Client and Attorneys in  
the context of settlement agreements. This includes Attorneys right to claim,  
negotiate and settle any claim to statutory fees simultaneously with the  
representation of Client in the prosecution of her claims. Client has been advised of  
this potential conflict, of her option of seeking additional legal counsel in connection  
with this conflict, and Client expressly agrees to this assignment.

21 7. The retainer agreements also included an acknowledgment of the contingent nature  
22 of the representation, and its impact on the calculation of reasonable fees.

23 Client has been given the choice of paying monthly for attorneys' fees on an hourly  
24 rate basis and for costs, as an alternative to a contingent fee. Client understands that  
25 if she chooses to pay fees on an hourly rate basis, rather than a contingent fee basis,  
26 she must pay all fees and costs even if the claims are lost. Clients knowingly and  
27 voluntarily agrees to pay fees on a contingent fee basis, or have statutory fees paid at  
28 a rate that is a multiple of Attorneys' then-current noncontingency hourly rate  
(*Ketchum v. Moses*), because fees are not paid before any amount is recovered and  
Client will not owe any attorneys' fees if she does not prevail against defendants.

1       8. In Section 6, the retainer agreements detailed the arrangement between plaintiffs  
2 and counsel during settlement:

3       It is agreed that no settlement of these claims may be made without Client's prior  
4 agreement. If, in settlement of this litigation, Client waives the right to recover  
5 attorneys' fees, costs or expenses (including partial waivers or compromises) without  
6 the consent of Attorneys, Client agrees to pay Attorneys: for waiver of fees,  
7 Attorneys' lodestar amount (their then-current hourly rate, as stated in section 5, as  
8 of the date of recovery times the number of hours expended on the case) times a  
9 contingent-risk multiplier of 2.0; and for waiver of costs, all of the costs advanced by  
10 attorneys in this case, whether or not a positive recovery is made by Client. Client  
11 understands that this agreement may give rise to potential disputes and conflicts  
12 between Attorneys and Client at the time of settlement, and in particular, where the  
13 defendants offer a settlement conditioned on the waiver, partial waiver or  
14 compromise of fees or costs and Attorneys are unwilling to agree to the waiver,  
15 partial waiver or compromise. Client understands that this agreement to pay the  
16 difference between Attorneys' statutory fees and costs and the amount of fees and  
17 costs paid in settlement may limit, or even nullify Client's recovery, and dissuade  
18 her from agreeing to a settlement with the defendants. Client has been advised of the  
19 option of seeking additional legal counsel on the topic. Client expressly agrees to  
20 this provision because she knows that otherwise Attorneys would be unwilling to  
21 enter into this agreement.

22       9. In addition to these contractual provisions, as a rule I protect against actual  
23 conflicts of interest during settlement discussions, by refusing to negotiate against my  
24 clients over "lump sum" offers. In all of my employment discrimination cases, I attempt  
25 first to negotiate a resolution of the clients' recoveries, independent of the claim to fees. For  
26 planning purposes, at the start of settlement discussions I may inform defendants or the  
27 settlement judge about my current hourly rates, the time I have expended to date, and my  
28 expectations on risk multipliers. In some particular situations, based on specific factors, I  
voluntarily am willing to facilitate a settlement by reducing or capping my claim to  
statutory fees. By and large, I will not attempt to settle fees while simultaneously  
representing my clients in discussions over settlement of damages.

10. After extensive experience litigating discrimination actions against Kaiser, as well  
as the failed mediation effort concerning plaintiff Gamble, I can attest to the policy and  
practice of Kaiser to avoid or reduce its liability by trying to pit plaintiffs' counsel against  
their own clients during settlement discussions. Often hidden behind a non-existent veil of

1 “settlement confidentiality,” Kaiser often will

- 2 – Offer “lump sum” settlements covering plaintiffs’ damages and counsel’s statutory  
3 attorneys’ fees, insisting that opposing parties and their counsel fight between  
4 themselves as to how the “lump sum” should be split.
- 5 – Insist that plaintiffs and counsel waive the right to claim statutory attorneys’ fees,  
6 arguing that counsel is in breach of ethical obligations towards the client if he  
7 holds up a settlement due to fees.
- 8 – Refuse to negotiate over attorneys’ fees in good faith, consistent with the adjusted  
9 lodestar methodology required under Title VII and FEHA, while simultaneously it  
10 rejects the submission of fees to the Court for determination.

11 11. Following the failed mediation effort between Kaiser and plaintiff Gamble, I wrote  
12 a demand letter to Kaiser’s attorneys, specifically so that there would be a record of  
13 plaintiff’s settlement posture outside any mediation privilege. A true and accurate copy of  
14 this demand letter is attached hereto as Exhibit A. Although we had hoped to engage Kaiser  
15 in settlement discussions, and at least obtain an offer of settlement on damages uncoupled  
16 from a demand to waive fees, Kaiser refused to respond to the settlement demand.

17 I declare under penalty of perjury that the foregoing is true and correct. Executed this  
18 22<sup>nd</sup> day of May, 2019.

19 /s/Jeremy L. Friedman  
20 Jeremy L. Friedman

### 21 CERTIFICATE OF SERVICE

22 I hereby certify that the foregoing was filed with the Clerk of the Court for the  
23 Northern District of California, by using the CM/ECF system. I certify that all participants  
24 in the case are registered CM/ECF users and that service will be accomplished by the  
25 CM/ECF system.

26 /s/ Jeremy L. Friedman  
27 Jeremy L. Friedman  
28